

STATE OF MAINE

DEPARTMENT OF MARINE RESOURCES

IN THE MATTER OF THE APPLICATION OF DODGE COVE MARINE FARM, INC., FOR AN AQUACULTURE LEASE LOCATED SOUTH OF HOG ISLAND, DAMARISCOTTA RIVER, DAMARISCOTTA, LINCOLN COUNTY, MAINE))))))	FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION
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On March 16, 2001, Dodge Cove Marine Farm, Inc., of Newcastle, Maine applied for an aquaculture lease totaling 7.23 acres of coastal waters of the State of Maine in the upper Damariscotta River, Damariscotta, Lincoln County, Maine. The applicant requested the lease for a term of ten years for the purpose of cultivating American oysters (Crassostrea virginica) and European oysters (Ostrea edulis) using bottom culture techniques.

Approval of aquaculture leases is governed by 12 M.R.S.A. §6072. This statute provides that the Commissioner of the Department of Marine Resources (DMR) may grant a lease if he determines that the project will not unreasonably interfere with the ingress and egress of riparian owners, navigation, fishing or other uses of the area; the ability of the site and surrounding areas to support ecologically significant flora and fauna; or the use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities. The Commissioner must also determine that the applicant has demonstrated that there is an available source of organisms to be cultured for the lease site.

A public hearing on this application was held on March 27, 2002 in Damariscotta.

Evidence Introduced Concerning the Nature

and Impact of the Proposed Lease

Mr. Richard D. Clime, vice-president of Dodge Cove Marine Farms, Inc. and his partner Mr. Gilbert Jaeger, provided testimony and answered questions on the company's application and operations. Dodge Cove Marine Farm, Inc. has been in the shellfish culture business in Maine since 1977. Its representatives are considered knowledgeable and well recognized in the industry. Mr. Clime is hereafter referred to as the applicant. Exhibits 1, 2 and 4.

The proposed lease has approximate dimensions of 450' x 700' and would be adjacent to the south side of the company's existing 2-acre (350' x 250') lease south of Hog Island in the upper Damariscotta River. The applicant testified that he accepted the Department biologist's differentially corrected global positioning system (dGPS) corner coordinates and size of the proposed lease corrected to 6.95 acres (436.34' x 688.95' x 452.46' x 674.44').

The applicant testified that the proposed lease would be used for bottom culture of American and European oysters. Sources for the oyster seed would be hatcheries such as Mook Sea Farms, Inc. in Walpole, Muscongus Bay Aquaculture, Inc. in Bremen or Marshall Point Sea Farms, LLC located in Port Clyde.

The proposed lease would be divided into 3 sections and planted on 3-year rotation basis with one-third of the area harvested during any given year, one-third growing and one-third being seeded with a new crop in densities of 10-15 oysters per square foot. The seed would be planted freely on the bottom without the use of containment apparatus. The applicant testified that the activity levels would remain similar to those practiced on the adjacent existing lease. When the oysters reach market size harvest would take place 1 – 2 days per week, April through December. A 3-foot wide drag would be used to harvest the oysters from a 21' boat. A work platform used at the adjacent lease activities would also be used for activities at the proposed site. A quiet electric, not hydraulic pump, is used for washing the oysters when harvested.

The applicant testified that access to the site and transport of oyster seed or harvested product from the proposed lease would take place at the Mook Sea Farm, Inc. facility in Walpole where his company rents space, has access to the river and maintains his boat moorings. The nearest public landing facility located in Damariscotta is used infrequently and primarily to launch his boat in the spring or to haul it out late in the year.

According to the application the mean tidal range is 9.5' and is subtidal with water depths ranging from 2' to 5' at mean low water. Tidal currents are generally less than 0.5 m/sec and are strongest during the flood stage in a southeast to northwest direction. The bottom sediments are mud composed predominantly of silt with sand and clay. Due to the lack of hard substrate there are scarce amounts of

attached forms of flora and fauna found on the site. Indigenous fauna include a few sponges, polychaete worms, opossum shrimp, pericardid crustaceans, sand shrimp, rock crabs, green crabs, spider crabs, small snails and occasional soft shell clams and quahogs. Horseshoe crabs are observed seasonally. In the applicant's opinion, plankton production (oyster food) in the upper Damariscotta River occurs in extremely high quantities, and therefore there is an ample supply of feed to support both wild and cultured organisms in the river. The applicant explained, regarding a comment by the regional biologist for the Department of Inland Fisheries and Wildlife (IF&W) concerning an eagle nest located on Hog Island, that the nest is located on the northern side of the island, away from and out of sight of the proposed lease and the existing lease located south of the island. He stated that since working on the existing lease, which began in 1994, their activities apparently have not disturbed the eagle as it has returned every year. He has observed an eagle sitting on one of the large pines on the south side of the island watching the area.

According to the application there has been limited use of the proposed lease site for commercial fishing. Clam harvesters accessing the nearby mudflats cross the site in their skiffs. The applicant testified that there is recreational fishing for striped bass or mackerel seasonally in the general area and confirmed that if anyone wished to set traps in the proposed lease that they are welcome, although traps have not been observed in the proposed lease site. The applicant explained that a limited population of wild European oysters has been completely harvested out of this area in recent years by draggers. The draggers also removed the shell remains that provided the settlement substrate for oyster sets, which means that a future wild European oyster resource is unlikely in this area.

The applicant confirmed that the proposed site is outside of the main navigation channel in shallow water south of Hog Island that is on the east side of the river. He testified that he would be willing to accept a condition, if the lease were granted, that would allow dragging only during daylight hours per the recommendation of the local Harbormaster. The applicant pointed out that dragging activities at night are generally those of poachers as his company only harvests their product during the daytime. The Harbormaster provided a letter included in the application that indicated his opinion that the proposed bottom lease would not interfere with navigation and that it is clear of the channel.

A biologist employed by the Department testified that there were no updates to or changes necessary to his Department report on the proposed lease. The statutorily required site review was conducted August 16, 2001. The Department report included the following: a scuba diver survey of the local flora and fauna and bottom composition; vertical profiles of the water column which include temperature, salinity and depths; proximity measurements of the proposed site to shore and to other leases, and observations and documentation of local fisheries. Exhibit 3.

According to the biologist's report the corrected acreage of the proposed lease would be 6.95 acres, which was determined by a survey quality dGPS. The estimated distance from the northeast corner of the proposed lease to the low water mark on the eastern shore is approximately 824'; the distance from the southeast corner to the low water mark on the eastern shore is approximately 1207'; and the distance from the southwest and northwest corners to the eastern edge of the navigation channel due west are approximately 366' and 880' respectively. Also, based on the scales and approximate distances in the report, the northern boundary of the proposed lease were estimated to be over 1400' from the southern end of Hog Island. The distance between the applicant's adjacent lease southern boundary and the northern side of the proposed lease is approximately 58'. The biologist observed one dock on the west side of Hog Island and he observed no moorings in the proposed lease area. The biologist also contacted the local Harbormaster, Mr. Paul Bryant, for his report. The Harbormaster was familiar with the existing leases and applicant's activities. The Harbormaster confirmed that there are no moorings in the proposed lease vicinity. The Harbormaster indicated that the area does ice over depending on the severity of the winter. Navigation of the area is limited primarily to the main channel located to the west and the Harbormaster confirmed that clam diggers pass the area along the west and or to the north side of the applicant's existing lease. The Harbormaster also indicated that seasonal recreational fishing does take place in the area. He also indicated that commercial fishing is limited to 4 or 5 crab fishers who usually fish their traps in the channel west of the proposed lease. The biologist observed a recreational charter vessel during the site visit and trap buoys were set south and west of the proposed lease.

According to the biologist's report the proposed lease is located in an area classified as open approved for the harvest of shellfish according to the Department's Public Health Division. The biologist made an underwater video that was taken during a scuba dive through the center area of the site from north to south. The bottom topography was uniformly flat and the bottom sediments were mud. The water depths were shallow, varying from about 3.94' at the southeast corner to 4.82' at the northwest corner at mean low water. Local flora included occasional knotted wrack and an unidentified red weed. Local fauna included an abundance of brown benthic diatoms and occasional observances of hermit crabs, horseshoe crabs, rock crabs, sand shrimp and sea scallop. No eelgrass was observed. No unusual measurements were recorded for temperature or salinity. The proposed lease is not located within any protected habitats regulated by the Department of Inland Fisheries and Wildlife for endangered, threatened or significant species.

Findings of Fact

The northern boundary of the proposed lease is located in shallow waters approximately 1400' south of the southernmost tip of Hog Island in the Damariscotta River. According to the Department's biologist and the local Harbormaster, the proposed lease does not contain any boat moorings. According to the applicant's testimony access to the proposed lease would be from a private facility in Walpole with very limited use of the Damariscotta public landing for access. No riparian lands were requested or required by the applicant for access or any proposed lease activities. The applicant has operated an existing 2-acre lease between the proposed lease site and Hog Island since 1994 without any comments having been received by the owner of Hog Island or any other person. Based upon the evidence and testimony, I find that the proposed lease activities will not unreasonably interfere with the ingress and egress of riparian owners.

The proposed bottom culture lease is located in shallow waters that range from approximately 2' - 4' at mean low water. According to the Department's biologist the southwest and northwest corners of the proposed lease are approximately 366' and 880' respectively east from to the eastern edge of the main channel of the Damariscotta River. The Harbormaster indicated that the proposed lease would not interfere with local navigation given that there are no structures and that it is clear of the navigation

channel. Based on the evidence, I find that vessel traffic is limited due to the shallow waters and that the proposed activities will not unreasonably interfere with navigation in the area.

The applicant, Department biologist and the local Harbormaster indicated that there is very limited or no commercial fishing and limited recreational fishing, which is primarily seasonal fishing for striped bass or mackerel in the area. The limited activity is attributable to the shallow water depths. The activities of crab or lobster fishing (traps), recreational fishing and boating described in the record would be allowed according to the applicant. The nearest existing aquaculture lease is held by the applicant and is located approximately 58' due north. The applicant testified that he would be willing to accept a condition recommended by the Harbormaster that dragging at night be prohibited. According to the biologist's report the area is classified as an open approved area for the harvest of shellfish. Based on the evidence that the area has a very limited amount of commercial and recreational fishing activity as shown by the testimony of the Department's biologist, Harbormaster and the applicant, and the condition that dragging at night be prohibited, I find that the aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area.

According to the biologist's report, a regional biologist from the Department of inland Fisheries and Wildlife confirmed that the proposed lease would not interfere with eagles observed on Hog Island. No information in the record indicated that the proposed activities would cause interference with the local flora and fauna. According to the biologist's report no eelgrass was observed within the proposed lease area. The applicant provided credible testimony that there is ample plankton production in the upper Damariscotta River for the existing wild and cultured marine organisms. Based on the evidence and testimony, I find that the proposed activities will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna.

The applicant testified that there are several local Maine shellfish hatcheries from which he may obtain seed oysters. They include Mook Sea Farms, Inc., Muscongus Bay Aquaculture, Inc. and Marshall Point Sea Farms, LLC. Based on this evidence and testimony, I find that there is an available source of American oysters and European oysters to be cultured for this lease.

Based on information in the application, the biologist's report, and the applicant's testimony regarding access for the proposed lease activities, I find that the proposed lease activities will not unreasonably interfere with public use or enjoyment and that the proposed lease site is not located within 1,000 feet of any municipally, state or federally owned beaches, parks, or docking facilities.

Conclusions of Law

Based on the above findings, I conclude that:

1. the aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner;
2. the aquaculture activities proposed for this site will not unreasonably interfere with navigation;
3. the aquaculture lease activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in the area;
4. the aquaculture lease activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna;
5. the applicant has demonstrated that there is an available source of American oysters (Crassostrea virginica) and European oysters (Ostrea edulis) to be cultured for the lease site; and
6. the aquaculture lease activities proposed for this site will not unreasonably interfere with public use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities.

The evidence in the record supports a finding that the proposed aquaculture activities meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072 (7-A).

Decision

Based on the foregoing, the Commissioner grants the requested lease of 6.95 acres to the applicant for a period of ten years, from the date of this decision, for the purposes of cultivating American oysters (Crassostrea virginica) and European oysters (Ostrea edulis), using bottom culture techniques as described in the application and the hearing record. The applicant shall pay the State of Maine rent in the amount of \$50.00 per acre per year. The applicant shall post a bond or establish an escrow account in the amount of \$500.00, conditioned upon its performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

Conditions to be Imposed on Lease

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities. Conditions are designed to encourage the greatest multiple, compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the aquaculture law.

The following conditions are placed on this lease:

1. lobster and crab fishing, recreational fishing and boating are allowed in the open areas of the lease;
2. dragging at night is prohibited; and
3. the lease area shall be marked in accordance with U.S. Coast Guard and Department of Marine Resources regulations Chapter 2.80.

The Commissioner may commence revocation procedures if he determines that substantial aquaculture has not been conducted within the preceding year, or that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law is not being observed, the Commissioner may revoke the aquaculture lease.

Dated: _____

George D. Lapointe (Commissioner)
Department of Marine Resources